No. 91-2051

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF SOUTH DAKOTA IN ITS OWN BEHALF, AND AS PARENS PATRIAE,

Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN OF THE CHEYENNE RIVER SIOUX TRIBE AND DENNIS ROUSSEAU, PERSONALLY AND AS DIRECTOR OF CHEYENNE RIVER SIOUX TRIBE GAME, FISH AND PARKS,

Respondents.

On Writ Of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF ON THE MERITS OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES IN SUPPORT OF PETITIONER

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The International Association of Fish and Wildlife Agencies, having obtained written consent of all parties to the case as required by Rule 37.3, submits this brief on the merits in support of petitioner State of South Dakota.

INTEREST OF AMICUS CURIAE

The International Association of Fish and Wildlife Agencies ("the International Association") is a District of Columbia not-for-profit corporation dedicated to coordinating the efforts of public administrative agencies responsible for the protection and management of the fish and wildlife of North America. Founded at Yellowstone National Park in 1902, the International Association numbers among its government members the fish and wildlife agencies of all fifty states, the Commonwealth of Puerto Rico, and of nine provinces and territories of Canada.

The analysis applied by the court of appeals to construe the Cheyenne River Taking Act, Pub. L. 83-776, 68 Stat. 1191 (1954), defeats the intent of Congress by means of a rule which denies effect to the implications of the statute. The State of South Dakota has invested more than thirty years of intensive fisheries management in the Oahe Reservoir. Management activity has included stocking and introduction of fish species, monitoring of fish populations and population dynamics, management for forage fish, and water quality studies. Application by the State of a full array of management practices has resulted in a high quality, nationally recognized fishery at the Oahe Reservoir. The State has enforced laws designed to protect this fishery including season limitations, bag limits, and legal methods of take. Tribal members residing near the reservoir have enjoyed access, without charge, to this enhanced fishery. Application of the *Bourland* analysis could affect state authority to regulate tribal nonmember hunting and fishing on thousands of acres of land taken for public flood control purposes in North

Dakota and South Dakota. Such areas are regarded as public areas open to hunting and fishing by tribal nonmembers, subject to regulation by the state.

STATEMENT OF THE CASE

Prompted by severe floods that devastated the lower Missouri River basin states in 1942, 1943 and 1944 and by the desires of upper basin residents for storage of water for irrigation, Congress in the Flood Control Act of 1944, Pub. L. 78-534, 58 Stat. 887, authorized a series of dams in the upper basin. The Oahe Reservoir is one of six main-stem reservoirs on the Missouri River constructed, operated and maintained by the Corps of Engineers. The reservoir is "under the direction of" the Secretary of the Army. *ESTI Pipeline Project* v. *Missouri*, 484 U.S. 495, 505 (1988). Section 4 of the Flood Control Act of 1944 provides for public use of water areas suitable for public park and recreation purposes, but no use of any such area shall be permitted "which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated." 16 U.S.C. § 460d. The Secretary of the Army is authorized to acquire lands for authorized projects pursuant to section 3 of the Flood Control Act of 1944. 33 U.S.C. § 701c.

Three of the earth fill dams built by the Corps across the Missouri River, the Garrison, the Oahe and the Fort Randall, flooded Indian lands on five Indian reservations in North Dakota and South Dakota. Damage to Indians of Five Reservations, Bureau of Indian Affairs, Missouri River Basin Investigations Project, Report No. 138, April 1954, 25 (hereinafter "MRBI

Report"), Trial Appendix BB. The site of the Oahe Dam is about six miles northwest of Pierre, South Dakota. The reservoir created by the impoundment extends for approximately 250 miles along the Missouri River from the Oahe Dam to the vicinity of Bismarck, North Dakota, flooding lands along the eastern boundaries of the Standing Rock and Cheyenne River Reservations and for miles up western tributaries of the Missouri. MRBI Report at 25, Trial Appendix BB.

Public Law 870, Approved September 30, 1950. In 1949, legislation was introduced to authorize the Chief of Engineers to negotiate separate contracts with the Sioux Indians of the respondent Cheyenne River Sioux Tribe in South Dakota and with the Sioux Indians of the Standing Rock Reservation in South Dakota and North Dakota for Indian lands and rights acquired by the United States for the Oahe Dam and Reservoir. As ordered reported on July 13, 1949, H.R. 5372, 81st Cong., directed the Chief of Engineers jointly with the Secretary of the Interior to negotiate contracts, containing provisions outlined in the bill, with representatives of the tribes. The contracts were to "convey to the United States the title to all tribal, allotted, assigned, and inherited lands or interests therein belonging to the Indians of each tribe required by the United States for the reservoir" to be created by the Oahe Dam. Under section 2 of the bill as reported, the contracts were to:

* * *

> (d) provide for the preservation of any treaty rights of the tribe in regard to fishing, hunting, and trapping, insofar as may be practicable under the physical conditions existing when the Oahe project is completed;
>
> and

> (e) provide for nonexclusive access rights to the Oahe Reservoir and for the reservation to the said Indians of the use of the land between the water line and the taking line insofar as the same may be consistent with the operation and control of the Oahe project.

§ 2(d), (e), H.R. 5372, 81st Cong., 1st Sess. (1949) (Union Calendar No. 429). H.R. 5372 was a substitute bill recommended by the Secretary of the Interior in lieu of H.R. 3582. In a departmental report occupying four pages of the House report, Interior Secretary Oscar L. Chapman advised Congress that construction of the Oahe Dam and Reservoir would cause serious losses to the Cheyenne River and Standing Rock Indians, that the Missouri forms the east boundary of the two reservations, and that much of the best land on the reservations is located along the river bottoms and back for some distance from the mouths of tributary streams. The department report declared that practically all of the river bottom land would be inundated, amounting to approximately 95,500 acres on the Cheyenne River Reservation. H. Rep. No. 1047, 81st Cong., 1st Sess. 3 (1949). In fact, more than 100,000 acres were eventually taken by Congress.

Secretary Chapman's report drew to the attention of the Committee that "Indians of both reservations would lose valuable wildlife resources and recreational areas." H. Rep. No. 1047, at 4. The department report explained:

> On the Cheyenne River Reservation, over 400 deer are estimated to live year long in the timbered area which will be inundated. In the bottoms area, pheasants, rabbits and raccoons are numerous. Several hundred bank-denning beaver are annually taken from the same area.

> Wildlife which provides important feed for over 100 families will be lost. On the Standing Rock Reservation . . . . Thus on both reservations, valuable recreational areas used for trapping and hunting will be lost. Fishing is not important on either reservation at the present time.

H. Rep. No. 1047, at 4-5. In view of the effect of the Oahe project on the two reservations, the Secretary's report observed that a fair and proper settlement with the Indians should encompass certain objectives including compensation of the Indians, tribally and individually, for their tangible as well as intangible losses. The Secretary also recommended that the Committee "adjust the Indians' fishing, hunting, and trapping rights, established by treaty, to the new conditions which will be created after the flooding of Oahe Reservoir." H. Rep. No. 1047, at 5. The departmental report enclosed a substitute draft similar to the House and Senate bills (H.R. 3582 and S. 1488) containing language "(d) for protecting Indian treaty rights in relation to hunting, trapping and fishing." H. Rep. No. 1047, at 6.

The House Committee on Public Lands accepted Secretary Chapman's recommended substitute, amending it in committee to add a new subsection (g) to section 2 providing that the contracts made jointly by the Chief of Engineers and the Secretary of the Interior shall "provide for the final and complete settlement of all claims by the Indians and tribes described in section 1 of this Act against the United States arising because of construction of the Oahe project." H. Rep. No. 1047, at 1. The bill as reported passed the House without

further amendment on August 1, 1949. 95 Cong. Rec. 10494 (August 1, 1949).

Hearings in the Senate on H.R. 5372, as passed by the House, were held before a subcommittee of the Committee on Interior and Insular Affairs. Senator Mundt of South Dakota explained that, without an authorization from Congress, the tribes "have no way of making a settlement with the Government unless the Government is empowered to negotiate with them on some basis so that a recommendation can be brought back to Congress." Hearing on H.R. 5372 Before a Subcomm. of the Senate Comm. on Interior and Insular Affairs, 81st Cong., 2d Sess. May 10, 1950, 11 (hereinafter "1950 Senate Hearing"), Trial Appendix M. Such a procedure, according to Senator Gurney, was preferable to the earlier settlement with the Fort Berthold Indians, a settlement brought directly to the Appropriations Committee, by-passing the Interior Committee (the legislative committee) and "because of the trouble and the long-winded arguments that lasted two years to my knowledge before the Appropriations Committee, we thought in preserving the Indian rights that we should get a little better system . . . . " 1950 Senate Hearing at 12, Trial Appendix M.

That the negotiations being authorized by Congress in 1950 were intended to provide for a complete settlement of all tribal claims was brought out in committee discussion of an objection raised by the Bureau of the Budget. A BOB letter to the committee addressed a companion bill, H.R. 3582, which made provision in section 6(h) thereof for considering, in the Cheyenne River and Standing Rock contracts, "compensation for

all breaches of treaty rights." BOB objected to the provision, believing that the Indian Claims Commission was the proper forum for such matters. The BOB stated: "It would be appropriate, in our opinion, to have this question [breaches of treaty rights] considered through proper channels, rather than to thrust that responsibility upon an investigatory group." S. Rep. No. 1737, 81st Cong., 2d Sess. 8 (1950).

Examining the witness D.S. Myer, Commissioner of Indian Affairs, the Subcommittee Chairman, Senator McFarland, inquired:

> Senator McFarland. Well, Mr. Myer, why should they not negotiate the matter of treaty provisions here if it is their desire to do so?
>
> Mr. Myer. I have not had the opportunity, Mr. Chairman, to know what the reasons were that lay behind the Bureau of the Budget's statement. This letter came to my attention last night. The only information I have on it is the fact that they have made this statement.
>
> Senator McFarland. Well, I do not mean in regard to other matters, but as far as this matter is concerned, it should be all-inclusive. When they negotiate a contract, it should include everything.
>
> That is the thing that some of us have not liked about some of these things, that the Indians never get their business wound up. It has just come back and come back and they hire lawyers, go before Indian Commissions and everything else. Now if you are going to negotiate a contract, let us make it a contract. Let us finish it up.

1950 Senate Hearing at 41, Trial Appendix M. Counsel to the Indian Commissioner, Mr. Flickinger, observed

that "This bill contemplates that everything will be wrapped up into one package." *Id.* at 42.

> Senator McFarland. Well, why make an exception to the breaking of the treaty in this regard?
>
> * * *
>
> Senator Gurney. If I might interrupt, Mr. Chairman, on page 4 of the bill, line 21, it says, "provide for the final and complete settlement of all claims by the Indians and tribes of these two reservations against the United States arising because of the construction of the Oahe project."
>
> * * *
>
> Senator Mundt. Mr. Chairman, if I may interpolate, that is important because these Indians are part of the Sioux Nation, and among other treaty rights which are under dispute and now before the Claims Commission, for example, are treaty rights involving the Black Hills and the Home State Gold Mine. Well, obviously, this bill does not want to get into something like that. That will be presented to the Claims Commission.

1950 Senate Hearing at 42-43, Trial Appendix M.

Mr. Flickinger also explained to the committee that if an individual Indian is not satisfied with the value of lands allotted to him, provision is made for a proceeding in federal court to determine the value of the particular tract, but that many of the elements to which an Indian is entitled by treaty rights would not be compensable in ordinary condemnation proceedings.

> Senator McFarland. Of course I think generally speaking the Indian gets more by negotiation than he would by court action.

Mr. Flickinger. I think that is true, and the court action would not take care of many of the elements which he is entitled to by reason of his treaty rights and other relationships of Government toward the Indian.

Senator Anderson. For instance?

Mr. Flickinger. Well, many of the intangibles probably would not be provided for.

Senator Anderson. Well, for instance?

Mr. Flickinger. Paying for the removal to new lands, the location of the new lands and the adjustment of these items which are contained in the act.

Senator Anderson. Why could not the court take that into consideration?

Mr. Flickinger. They could if the act of Congress authorized that, but in ordinary condemnation proceedings many of those elements would not be included.

1950 Senate Hearing at 48-49, Trial Appendix M. Through its counsel J.W. Kimbel, the Office of Chief of Engineers objected to the "payment of compensation beyond relocation and land costs such as provision for the fulfillment of treaty obligations, re-establishment of economic, social and religious life and similar intangibles." 1950 Senate Hearing at 61, Trial Appendix M. Compensation for such intangibles should, instead, according to the Department of the Army, be the subject of an investigation and report by the Secretary of the Interior.

As reported by the Senate Committee, H.R. 5372 did not contain the treaty preservation language of section 2(d) of the Interior Department's substitute, viz., "preservation of any treaty rights of the tribe in regard to fishing, hunting, and trapping, insofar as may be practicable under the physical conditions existing

when the Oahe project is completed." S. Rep. No. 1737, 81st Cong., 2d Sess. 1-2 (1950). And, explaining conference committee action, Mr. Case of South Dakota stated on the House floor:

> There is one important change in that a paragraph was added by the conferees which provides for ratification on the part of the tribe in conformance with the provisions of a treaty made many years ago, whereby the ratification of the tribe to cessions of land would have to be by the vote of three-fourths of the adults of the tribe. We believe that it is better to provide that kind of ratification as far as the Indians are concerned, rather than by other methods, so there would be complete accordance with the treaty and not raise any questions later as to the validity of the action. Of course, it is generally recognized that Congress has the plenary power to legislate as it pleases but it ought not to disregard treaty rights once ratified.

96 Cong. Rec. 15609 (September 22, 1950). As to whether the original law which authorized the dams had not required the government to make settlements with everybody whose property is affected, Mr. Case observed:

> Mr. Case of South Dakota. The gentleman is partly correct but not entirely so. Under long established interpretations, where water rights were reserved by treaty to Indian tribes the Government cannot settle for them in the normal manner if it comes in and takes the land. Water rights were reserved to the Indians in these cases. Destruction of the tribe's rights on the Missouri River and its tributaries could not be properly compensated for by settlement to individuals for individual tracts of land.

> Hunting and fishing rights also were a part of the rights recognized by treaty in 1851 and 1868 and ratified by the Congress. To the extent that these may be impaired or destroyed, the tribe is entitled to compensation apart from settlement with the allottees holding individual tracts of land.

96 Cong. Rec. at 15609. Thereafter, Public Law 870, 64 Stat. 1093 (1950), was enacted authorizing the negotiation of separate contracts with respondent Cheyenne River Sioux Tribe and with the Sioux Indians of the Standing Rock Reservation.

Public Law 776, Approved September 3, 1954. Negotiations with respondent Cheyenne River Tribe under ~~Public Law~~ 870 did not result in an agreement as to price to be paid the tribe for its land and interests therein. The tribe informed government negotiators that, because negotiations as to price for the land had failed, the tribe would not be able to proceed with further negotiations and that the matter would be presented to Congress. Accordingly, the negotiations were concluded on November 26, 1952. H. Rep. No. 2484, 83rd Cong., 2d Sess. 9-10 (1954).

Negotiations under Public Law 870 having failed, a tribal delegation determined that "it was now necessary to report to the Congress on our failure to agree and also to submit to the Congress a bill in the form of an agreement between the United States and the Cheyenne River Sioux Tribe." Oahe, Report of the Washington Delegation, January 21-31, 1953, 2 (hereinafter "Tribal Delegation Report"), Trial Appendix V. The text of the bill prepared by counsel for the tribe was introduced by Senator Case as S. 695, 83rd Cong., and in the House by Cong. Berry as H.R. 2233. Tribal Delegation

Report at 11, Trial Appendix V. Section X of the tribal draft is identical to Section X of Public Law 776, subsequently enacted on September 3, 1954.

Section XI of the tribal draft introduced as H.R. 2233 and S. 695[1] dealt with assistance by the United States to tribal members whose lands are within the taking area. The Department of the Interior was directed to purchase substitute allotments, using funds provided out of monies placed to the credit of the individual involved, and reconvey such lands to the individual under trust patents. According to the tribe's draft of Section XI, "The lands so selected and purchased as substitute allotments may be either within the boundaries of the Cheyenne River Reservation *as diminished by this agreement* or outside said reservation as may meet the desires of the individual involved in the several transactions." (Emphasis added.)

Several days of hearings were held in May 1954 on H.R. 2233 and S. 695 by a Joint Senate and House Subcommittee on Indian Affairs of the Committees on Interior and Insular Affairs. Placed before the Joint Senate-House Subcommittee was the April 1954 report of the Bureau of Indian Affairs Missouri River Basin Investigations Project dealing with damages to Indians expected to arise from the Oahe and Fort Randall Reservoir and Dam Projects

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[1] Mr. Sigler, counsel for the Bureau of Indian Affairs (BIA), testified before the Joint Senate-House hearing that when negotiations under Public Law 870 on the value of land broke down, the tribe advised they did not wish to discuss other provisions and would submit their proposal to Congress. "Their proposed agreement has been embodied in this bill that you are considering today." Joint Senate-House Hearing at 157, Trial Appendix RR.

being constructed on the Missouri River by the Corps. According to the MRBI Report,

> Because of the special status of Indians in relation to the Federal Government and because of their unique cultural background, Congress has indicated that settlement for takings of Indian land should include funds for relocating families displaced by the reservoirs and for re-establishing and protecting the economic, social, religious and community life of the Indians affected [citing Public Law 870]. Compensation thus was to cover the indirect and intangible as well as the direct damages.

MRBI Report at 2, Trial Appendix BB. The report noted that although full agreement had not been reached on property values, the major item in dispute was the magnitude of secondary costs and losses and intangible damages. Wide differences of opinion, according to the MRBI Report, prevented negotiators from getting within negotiating range on a total settlement price for all properties, costs, losses, and damages growing out of the takings and thus a just settlement eventually would have to be referred to Congress for final decision. MRBI Report at 5. Using a January 1951 study prepared by Fish and Wildlife Service, the MBRI Report estimated an annual loss of wildlife of $74,300 to the Cheyenne River Reservation as a result of flooding of Indian lands. Table 24, MRBI Report at 78, Trial Appendix BB. Examining Mr. Kimbel, the Corps' witness, the House Subcommittee Chairman and sponsor of H.R. 2233, Mr. Berry,[2] stated:

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[2] According to Senate Interior Committee Chairman Watkins in executive session, "We have had various types and kinds of appraisements. The Indians want a lot more money than the bill I am willing to recommend carries. I do not know, Senator Case is one who has been backing this and Congressman Berry of South Dakota, in the House, Chairman of the Indian Committee, it is in his District. I might say that Senator Mundt is also interested in it." Hearings Before the Senate Committee on Interior and Insular Affairs on H.R. 2233, 83rd Cong. 2d Sess., Executive Session, August 17, 1954, 3, Appendix EE.

> Now, if that value, $74,300 figure is correct, that is almost $2 million, when computed and capitalized at four percent is it not?
>
> Mr. Kimbel. It may be. I am not qualified to answer that question that quick; that may well be, but let me make this observation on that: Capitalizing gross income is not normally the basis of determining the value of property. If the Congress wants to compensate the Indians on that basis, it is its prerogative to do so, but it is not normally the method used in determining the value of property.

Joint Senate-House Hearing at 68, Trial Appendix U. And, on the Corps' objection that compensating for wildlife loss would constitute double compensation inasmuch as the tribe seeks to reserve hunting and fishing rights, the Chairman stated:

> Mr. Berry. And certainly it could not be determined as double, the percentage double, where one feature of the damage is taken out, could it?
>
> Mr. Kimbel. Not exactly but, in effect, what we are saying, Mr. Chairman, is that the Fish life [sic] which would be reserved to the Indians under this bill are worth zero.
>
> Mr. Berry. That is right.

> Mr. Kimbel. About the hunting rights that they would lose by the taking of this land being worth $2 million, now you may or may not be correct in that, but if you say the hunting rights that will be reserved in this bill are zero, then why write it into the bill?
>
> Mr. Berry. It is under the treaty of 1868, which reserves it for them. And the bill simply reserves one feature of the 1868 Treaty.

Joint Senate-House Hearing at 68-69, Trial Appendix U.

Testifying for the Bureau of Indian Affairs, Mr. Sigler, Bureau counsel, stated that the negotiations under Public Law 870 came to a stop when the Indians and the Army failed to agree on a figure for direct damage to land. Concerning other provisions of an agreement including indirect damages, the tribe did not wish to continue discussion. According to the witness,

> When the Indians and the Army failed to agree on that figure [for direct damage to land], all negotiations stopped. And the Indians indicated that they did not wish to consider the other provisions of the agreement and wish to submit it to the Congress. Their proposed agreement has been embodied in this bill that you are considering today.

Joint Senate-House Hearing at 157, Trial Appendix RR. The bills before the committee, therefore, represented tribal desires on which the parties had failed to reach agreement in the Public Law 870 negotiations.

On the subject of indirect damages, the following exchange occurred between Senate Chairman Watkins and the BIA witness:

> Senator Watkins. Do all members living on the reservation participate in some phase of this proposed damage?

> Mr. Sigler. The answer is "yes." They will.
>
> Senator Watkins. I thought those that have lands not actually on the river bottom will probably claim some compensation by reason of taking the hunting grounds along the river.
>
> Mr. Sigler. The present owners are individual owners or allottees, and also the tribe has some tribal land, so that the entire tribal membership will benefit from any figure paid for tribal lands.
>
> In addition to that, some of the indirect damages proposed will be for the benefit of the entire tribe; that is, the loss of hunting grounds and so forth.

Joint Senate-House Hearing at 158, Trial Appendix RR.

Finally, tribal counsel Ralph Case drew the Joint Committee's attention to Article XII of the Treaty of April 29, 1868, which provides that no cession of any portion of land shall be of any validity unless the cession is ratified in writing by three quarters of the adult males of the tribe. In order to assure that the United States not take a title that does not conform to the 1868 treaty, counsel for the tribe urged that the 75 percent requirement be observed. Joint Senate-House Hearing at 216-A, Trial Appendix RR. The tribe recommended that the wildlife loss be set at $1,857,500, based on capitalizing at four percent the $74,300 annual loss of wildlife resources, as taken from the MRBI Report. Joint Senate-House Hearing at 265-66, Trial Appendix RR.

Tribal counsel Case provided a section-by-section analysis of the provisions of the pending bills drafted by

the tribe. As to Section X, providing access to the shoreline and reservoir to hunt and fish, without cost, subject to regulations governing the corresponding use by other citizens of the United States, tribal counsel observed that the right to hunt and fish is a valuable right which remains in existence. Joint Senate-House Hearing at 289, Trial Appendix RR.

Following the joint hearings, the tribal negotiating committee scaled back the tribal claim for loss of wildlife and wild fruit from $1,857,500 to $1,056,750. H. Rep. No. 2484, 83rd Cong., 2d Sess. 5 (1954).

The Interior Department recommended enactment of H.R. 2233 with amendments. In its report to the Committee, it too was of the opinion that the agreement to convey lands to the United States for the Oahe Reservoir would result in diminishing the boundaries of the Cheyenne River Reservation. Commenting on Section XI relating to substitute allotments, Assistant Secretary Lewis stated:

> Seventh, it is recommended that Section XI be amended to provide that title to the lands purchased in substitution for allotments or assignments within the taking area be conveyed in restricted fee to the individual Indian owners if the substitute lands are within or adjacent to the Cheyenne River Reservation boundaries as diminished by this agreement
>
> . . . .

H. Rep. No. 2484, 83rd Cong., 2d Sess. 14 (1954). Just as contemplated by Public Law 870, H.R. 2233 as reported by the House Interior Committee provided in Section 2 for a "final and complete settlement of all claims, rights, and demands of said Tribe or allottees or heirs thereof arising out of the construction of the Oahe

project." Section 2 provided a payment for lands or interests therein of $2,614,778.95 and a payment of $3,973,076 for tribal severance damages and for loss of timber, wildlife and wild fruit resources. H. Rep. No. 2484 at 6. Explaining Section 10, the report states simply that "after the gates are closed, the Indians, without cost, shall have grazing rights between the taking line and the reservoir and fish and hunting rights on the reservoir and its shoreline." H. Rep. No. 2484 at 7.

As enacted on September 3, 1954, Public Law 776 was little changed from the tribal draft except in respect of sums paid in final and complete settlement of all claims, rights and demands of the tribe arising out of the Oahe project.

The ballot laid before the adult members of the Cheyenne River Tribe following enactment of Public Law 776 included the following statement in describing the major provisions of the agreement embodied in the enactment:

> 6. Indians may graze livestock on the [illegible] of the land not flooded and may hunt and [illegible] in the taking area without charge.

Trial Appendix HH. Of 1,942 ballots cast, 1,790 or 92 percent were cast for approval of the agreement embodied in Public Law 776.

SUMMARY OF ARGUMENT

I. The court of appeals narrowed the holdings in *Montana* v. *United States*, 450 U.S. 544 (1981) and *Brendale* v. *Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989), to mean that

alienation of lands affects tribal jurisdiction only where there exists a clear expression of congressional intention to divest a tribe of regulatory authority. The Eighth Circuit thereby transmuted the general principle of *Montana* and *Brendale* which in fact requires that treaty rights of Indian tribes be read in light of subsequent alienation and, further, that exercise of inherent tribal sovereignty beyond that necessary for tribal self-government depends on express congressional delegation. Avoiding the general principle of *Montana* and *Brendale*, the court of appeals substituted the analysis of *United States* v. *Dion*, 476 U.S. 734 (1986), thereby neutralizing the implications of acquisition by the United States of lands for construction of the Oahe project and the dedication of such lands to public use in the court's determination that regulatory authority exists in the tribe over lands taken for the reservoir.

II. Even *Dion* v. *United States*, 476 U.S. 734 (1986), does not authorize a court to avoid the implications of acts of Congress or to fail to give effect to the customary legal incidents implicit in actions taken by Congress. Congress in the Cheyenne River taking act, Pub. L. 83-776, 68 Stat. 1191 (1954), intended a final and complete settlement of all claims arising out of construction of the Oahe project, including breaches of treaty rights necessitated by the taking. Congress compensated the tribe for wildlife losses and reserved in Section X a non-exclusive right in the tribe to hunt and fish on the taken lands. If the tribe's sovereign right to regulate on the taken lands had been left unaffected, it is difficult to understand why a reservation of access would be necessary. The court of appeals did not give

the language of the taking act or its legislative history the "fair appraisal" required. *Oregon Fish & Wildlife Dep't* v. *Klamath Tribe*, 473 U.S. 753, 774 (1985).

ARGUMENT

I. The Court of Appeals Erroneously Narrowed the Holdings of this Court in *Montana* and *Brendale*, Transmuting the General Principle of Those Cases Concerning Tribal Authority Over Non-Indians Absent Express Congressional Delegation

Montana v. *United States*, 450 U.S. 544 (1981) and *Brendale* v. *Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989), teach that treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands, 450 U.S. at 561, and that exercise of inherent tribal power beyond what is necessary to tribal self-government depends on express congressional delegation. 450 U.S. at 564. The court of appeals in the instant case narrowed *Montana* and *Brendale*, asserting that tribal regulatory authority over non-Indian fee lands in those cases was found to be abrogated because of an intention by Congress in Allotment Acts to destroy tribal government. In order, therefore, to determine the jurisdiction of the Cheyenne River Sioux Tribe over lands taken for the Oahe Reservoir, the court of appeals decided it must examine the taking act to see if Congress clearly expressed an intention to divest the tribe of regulatory authority over hunting and fishing on the taken area. 949 F.2d at 991. In further support, the court of appeals adds a "*See Dion*" citation. *Id.*

By limiting the holdings in *Montana* and *Brendale* to a basis for the holdings, the court of appeals transmutes their general principle. Subsequent alienation of tribal lands thus is of significance in the court of appeals analysis only if Congress clearly expressed an intent to divest the tribes of regulatory authority, and the lack of an express congressional delegation for tribal authority concerning nonmembers is of no import whatsoever in the Eighth Circuit analysis.

Under *Montana* and *Brendale*, alienation of tribal lands without the impress of a trust may well constitute a *per se* rule in respect of tribal sovereignty over nonmembers but, even if it were not, it is clearly a major factor demanding analysis by a court. Here the court of appeals gave the taking of land for purposes of a great national flood control project no consideration whatever. Had the United States purchased Indian trust allotments or other tribal lands for purposes of reclamation works wholly for the benefit of a tribe, the reading of treaty rights in respect of such alienation may be that such rights are simply not affected. *See*, e.g., Regulation of Hunting and Fishing on Wind River Reservation in Wyoming, 58 Interior Dec. 331, 334-35 (1943). *See also Brendale*, 429 U.S. at 439 (noting that it is inconceivable that Congress would have intended that the sale of a few lots would divest the tribe of zoning authority) (opinion of Stevens, J.). Similarly, if it is clear that, regardless of alienation of tribal lands, it was the intention of Congress to dedicate a reservoir project to Indian use, then inherent rights of self-government might well not be disturbed by the alienation of tribal lands. Here the court of appeals engaged in no such analysis, applying instead a platonic search for

clear congressional intent to divest respondent tribe of regulatory authority over the Oahe Reservoir.

That the Oahe Reservoir is part of a comprehensive federal program to avoid widespread flooding in a major river basin, that the Reservoir is controlled by and under the direction of the Secretary of the Army, *ESTI Pipeline Project* v. *Missouri*, 484 U.S. 495, 505 (1988), that exclusive tribal rights to use and occupancy of the taken lands no longer exist, that construction, operation and maintenance of the reservoir have been paid for by the general public, that Congress explicitly provided for public use of water areas suitable for public park and recreation purposes, 16 U.S.C. § 460d, and that the Chief of Engineers is directed to give preference to federal, state or local government agencies in leasing or licensing use of project areas so long as the use is for a public purpose, 16 U.S.C. § 460d, are all relevant considerations not entering into the Eighth Circuit analysis. Nor did the court of appeals consider, for this purpose, the provision in 16 U.S.C. § 460d (Section 4 of the Flood Control Act of 1944) that "no use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game in the State in which such area is situated." None of these items was deemed relevant by the court of appeals because none represented "a sufficiently clear expression of an intention to divest tribal regulatory authority on the taken area." 949 F.2d at 992. Perhaps, but each is directly relevant to the *Montana*, *Brendale* principle that treaty rights must be read in light of subsequent alienation of tribal lands. In effect, the court of appeals precluded the operation of *Montana* and *Brendale* and short-circuited the search

for congressional intent, searching instead for the existence *vel non* of special recitations.

II. A Fair Appraisal of the Taking Act and Its Legislative History Indicates That Congress, the Tribe and Federal Agencies Believed That Tribal Regulatory Authority Would Not Continue Over the Taken Area

As stated for the Court by Justice Stevens in *Oregon Fish & Wildlife Dep't* v. *Klamath Tribe*, 473 U.S. 753, 774 (1985), courts cannot ignore plain language that, viewed in historical context and given a "fair appraisal," clearly runs counter to a tribe's later claims. Moreover, solicitude for Indian tribes does not require courts to avoid the implications of congressional language or refuse to give effect to customary legal incidents implicit in actions taken by Congress. *United States* v. *Dion*, 476 U.S. 734 (1986), although involving a statute of general applicability in contrast to the instant enactment cast in the form of an agreement with a single tribe, is not to the contrary. Required in *Dion* was clear evidence that Congress considered the conflict between its intended action and treaty rights and chose to resolve the conflict by abrogating the treaty. 476 U.S. at 740.

At no place in the statutory language or in the legislative history of Public Laws 870 and 776 is there an explicit assertion that Congress intended to divest respondent tribe of regulatory authority over nonmembers on the taken area. Yet no one can review the history of Public Laws 870 and 776 without coming away with the conviction that continuation of tribal

regulatory authority over the taken area was completely out of contemplation. There is not the slightest suggestion that any of the players, Congress, federal agencies or the tribe itself, contemplated the reservation of rights other than those expressly reserved. The attempt by the court of appeals to assess congressional intent by formal rules requiring explicit congressional recitations should be rejected by this Court.

The holding in *Dion* involved a law of general applicability and in the context of such a law the *Dion* analysis serves as an appropriate safeguard against the unintended abrogation by Congress of treaty rights. However, in the context of a "complete settlement of all claims, rights and demands" embodied in legislation, the dynamic changes and Congress may indeed intend to affect rights unless they are specifically reserved. No question exists that Congress was aware of the treaties for the legislative history is full of references thereto. Instead the issue is how Congress resolved the conflict between treaty rights and the taking of lands necessary for the Oahe Dam and Reservoir. Amicus curiae International Association believes that the following items clearly manifest the intention of the parties.

Settlement of All Claims. Section II of Public Law 776 stated explicitly that payment to the tribe of $5,384,014 for lands and interests therein "shall be in final and complete settlement for all claims, rights and demands of said Tribe" arising out of construction of the Oahe project. The amount included both direct and indirect damages including loss of wildlife resources. Hearings Before the Senate Committee on Interior and Insular Affairs on H.R. 2233, 4 (August 17, 1954) (remarks of Chairman Watkins), Trial Appendix EE. A

BOB proposal to remove from the bill compensation for breaches of treaty rights and to send such matters to the Indian Claims Commission was rejected, a paragraph being added to section 2 to make clear that the contract to be negotiated would constitute a complete settlement of all claims by the Indians and tribes against the United States arising because of construction of the Oahe project, not just a payment for land. § 2(e), Public Law 870.

Reservation of Non-Exclusive Access. Section X of Public Law 776 declares that the tribal council and members shall have:

> [W]ithout cost, the right of free access to the shoreline of the reservoir, including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

§ X, Pub. L. 776. As in *Dion*, 476 U.S. at 740, it is difficult to understand why Congress would have reserved to the tribe and its members a non-exclusive right of access, a property right, if the overarching sovereign right in the tribe to regulate the taken area were left unaffected. The tribe's explanation of Section X compounds rather than resolves the difficulty. According to respondent, "Because the Tribe's sovereign powers continued unabated after enactment of the Act, the Tribe needed to retain in the Act only the right of access in order to use the resources of the taken area." Opposition to Petition for Writ of Certiorari, 20, n.8. That explanation obviously begs the question. Further, the ordinary incidents of a right of access are that it is a property right. According to the tribe, therefore, its sovereign right to regulate is reserved to the tribe

through the medium of a property right, and a non-exclusive one at that.

The Tribe's Understanding. In a reversal of normal procedure, the bills considered in the 83rd Congress (H.R. 2233, S. 659) were the product of drafting by tribal counsel and constituted the terms of the agreement sought but not attained by the tribe in the Public Law 870 negotiations. Under the usual canon, doubts are resolved against the drafter. Putting that notion aside, certainly the tribe cannot have anticipated that its "sovereign powers would continue unabated after enactment" when its own draft referred in Section XI to "the boundaries of the Cheyenne River Reservation as diminished by this agreement."

Compensation for Loss of Wildlife. According to the report to the Senate and House committees by Interior Secretary Chapman on the bill that became Public Law 870, "Fishing is not important on either reservation at the present time." S. Rep. No. 1737, 81st Cong., 2d Sess. 5 (1950). In consequence, tribal regulatory rights over fishing in the Oahe Reservoir would relate to a fishery established and enhanced by the State which did not even exist at the time of taking. Such an outcome, as stated in *Dion*, does not promote sensible law. 476 U.S. at 746. Because loss of fish was not even considered in the MRBI Report, compensation for wildlife alone was claimed and the *gross* annual value of big game, upland birds, small game and furbearers taken by the tribe, estimated at $74,300, was capitalized at $1.8 million by use of a four percent rate. While the actual compensation set forth for this element in Public Law 776 may have been less, clearly Congress compensated the tribe for loss of wildlife. Had tribal regulatory

rights concerning wildlife continued unabated following enactment, payment for loss in perpetuity of such resources would be inconsistent therewith. *See Oregon Fish & Wildlife Department* v. *Klamath Tribe*, 473 U.S. 753, 773 (1985). Mr. Berry, Chairman of the House Subcommittee having cognizance of the legislation in the 83rd Congress, put the matter well in explaining to the Corps witness why hunting rights were being paid for while still being reserved in the bill. According to Mr. Berry: "It is under the treaty of 1868, which reserves it for them. And the bill simply reserves one feature of the 1868 Treaty." Joint Senate-House Hearing at 69, Appendix U. The feature reserved by the bill was a non-exclusive right of access.

Throughout the hearings in legislation leading up to Public Laws 870 and 776, it was clear that compensation was being paid for more than title and interests in land. All rights of the tribe were being acquired except those expressly reserved. As for fish and wildlife, a non-exclusive right to hunt and fish, not the sovereign prerogative to regulate hunting and fishing by nonmembers, was reserved. The language of the earlier Interior draft providing for "preservation of any treaty rights of the tribe in regard to fishing, hunting and trapping, insofar as may be practicable under the physical conditions existing when the Oahe project is completed," supra, at 4, 10, was dropped by the tribe in the draft legislation presented to Congress and replaced by a non-exclusive right of access to hunt and fish.

CONCLUSION

For the reasons set forth, amicus curiae International Association requests that this Court reverse the ruling of the court of appeals that the Cheyenne River Sioux Tribe possesses civil regulatory jurisdiction over nonmembers on lands and waters acquired in fee by the United States for construction of the Oahe project.

Respectfully submitted,

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